

No. 15,496

IN THE

United States Court of Appeals
For the Ninth Circuit

WALTER HOWARD THOMAS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title
28 United States Code.

STATEMENT OF THE CASE.

Appellant is serving a 20-year sentence in the United States Penitentiary at Alcatraz Island, California. On February 16, 1955, an indictment was returned against appellant charging 25 counts of violations of 18 U.S.C. Section 641. Counts 1 through 12 charged appellant with theft of Government property; Counts

13 through 24 charged appellant with sale of Government property, and Count 25 charged appellant with concealment of stolen property. After a jury trial, appellant was sentenced to concurrent and consecutive terms of imprisonment totalling 20 years. A timely appeal was taken from the judgment of conviction. Motions for leave to appeal in forma pauperis were denied by the District Court and the Court of Appeals. On May 25, 1955, appellant filed a motion for new trial and to vacate sentence, which motions were denied by the District Court on June 17, 1955. On October 14, 1955, the appeal from the original judgment was dismissed by the Court of Appeals for failure to prosecute.

On April 24, 1956, appellant filed a motion to vacate sentence which was denied by the District Court on April 30, 1956. Thomas appealed from the order of denial, but the Court of Appeals denied his motion to prosecute the appeal on typewritten transcript of record and briefs on the ground that no justiciable question was presented, and the appeal was dismissed for failure to prosecute on December 20, 1956.

On January 18, 1957, Thomas filed a motion to correct sentence, which was denied by the District Court. The present appeal is from the order of denial.

OPINION BELOW.

Thomas has moved, pursuant to 28 U.S.C. 2255 and Rule 35 of the Federal Rules of Criminal Procedure, for correction of the sentence of twenty years' im-

prisonment imposed upon him herein on March 15, 1956. The charges upon which Thomas was convicted were contained in a twenty-five count indictment. The first twelve counts charged him with stealing and converting to his own use certain quantities of lead belonging to the United States. Counts thirteen through twenty-four charged him with unlawfully selling these quantities of lead. Count twenty-five charged him with unlawfully concealing with intent to convert to his own use other lead belonging to the United States. The Court sentenced him to ten years' imprisonment on each of the first twelve counts, the terms to run concurrently. A ten-year term of imprisonment was imposed on count thirteen to commence after the expiration of the term of imprisonment imposed on count one. Ten-year terms were imposed on each of counts fourteen through twenty-five, such terms to run concurrently with the term imposed on count thirteen, and with each other.

Thomas is presently serving the ten-year term imposed on counts one through twelve. He contends that counts thirteen through twenty-four will not support an additional sentence of ten years' imprisonment because they charge the same offense charged in the first twelve counts. The unlawful sale charged in counts thirteen through twenty-four, he argues, is but a part of and continuation of the conversion charged in the first twelve counts.

Assuming that the Court has jurisdiction at this time to entertain a motion to correct the sentence on counts thirteen through twenty-four, it is not neces-

sary to determine the question tendered. There is no doubt that count twenty-five charges an offense separate and distinct from any of the offenses charged in the first twelve counts. Although the judgment fixes the time for commencement of the term imposed on count twenty-five by stating that it shall run concurrently with the term imposed on count thirteen, it is perfectly clear that the Court intended the term imposed on count twenty-five to commence upon the expiration of the term imposed on the first twelve counts. Thus the total sentence of twenty years' imprisonment is a valid one whether or not counts thirteen through twenty-four support a sentence consecutive to the sentence imposed on counts one through twelve.

The motion to correct sentence is therefore denied.

QUESTIONS PRESENTED.

Appellant urges in his brief that the following questions are presented:

1. Did the District Court err in holding that Count 25 of the indictment charged an offense separate and distinct from any of the offenses charged in the first 12 counts of the indictment?
2. Did the District Court err in holding that the sentence on Count 25 was imposed consecutively to the sentence imposed on Counts 1 through 12?
3. Did the District Court err in not ruling on the merits of appellant's allegation that the charges con-

tained in Counts 13 through 24 were merged into the charges contained in Counts 1 through 12 and would not support consecutive sentences?

ARGUMENT.

I.

COUNT 25 OF THE INDICTMENT CHARGED AN OFFENSE SEPARATE AND DISTINCT FROM ANY OF THE OFFENSES CHARGED IN THE FIRST 12 COUNTS OF THE INDICTMENT.

The first 12 counts of the indictment charged appellant with theft of quantities of lead belonging to the United States on or about the first day of 12 successive months commencing December, 1953, and ending November, 1954. The 25th count of the indictment charged Thomas with the concealment and retention of stolen Government lead on December 15, 1954. It is clear from the face of the indictment that the concealment and retention, which occurred more than a year after the first theft and 44 days after the last theft charged, constituted an offense entirely separate and distinct from any of the offenses charged in the first 12 counts. The lead referred to in the 25th count is obviously not the same property as that referred to in any other count in the indictment.

Even if it were assumed that Thomas did steal the lead referred to in the 25th count (with which theft he was not charged), there would be nothing improper about consecutive sentences for the theft on the one hand and the concealment and retention on the other. On September 1, 1948, Congress amended Section 641,

deleting the requirement that the property be stolen "by any other person" for a charge of concealing and retaining stolen Government property. Thus the thief himself may be charged with concealment or retention of stolen property under Section 641, just as he may be charged with possession of property stolen by himself under Section 659, relating to interstate shipments. *United States v. Cordo*, 186 F. 2d 144 (2d Cir. 1951), cert. denied 340 U.S. 952; *United States v. Dolasco*, 184 F. 2d 746 (3d Cir. 1950); *Carroll v. Sanford*, 167 F. 2d 878 (5th Cir. 1948); *Bloch v. United States*, 261 Fed. 321 (5th Cir. 1919), cert. denied 253 U.S. 484; *Carrol v. United States*, 174 F. 2d 412 (6th Cir. 1949), cert. denied 338 U.S. 874; *United States v. Dunbar*, 149 F. 2d 151 (7th Cir. 1945), cert. denied 325 U.S. 889; *Carpenter v. Hudspeth*, 112 F. 2d 126 (10th Cir. 1940).

It has also been held proper to impose consecutive sentences on one charge of robbing a mail carrier of mail matter and another charge of receiving, concealing, and retaining the same mail matter. *Kimball v. United States*, 128 F. 2d 736 (5th Cir. 1942).

For a holding to the effect that retention of stolen property under Section 641 is a separate offense apart from other offenses, see *Lewis v. Hudspeth*, 103 F. 2d 23 (10th Cir. 1939).

The Federal cases cited by appellant to bolster his argument that the offense charged in Count 25 was a "restatement" of the offenses charged in Counts 1 to 12, do not support that proposition. The cases

cited referred to entirely different matters, such as the receiving and sale of counterfeit money, the theft of separate pieces of mail matter, continuous embezzlements over a period of time, and single transactions in violation of the Mann Act. The New York state case cited by appellant on the question of the liability of the thief for concealment or withholding of stolen property is clearly distinguishable since the decision is based entirely upon the construction of two state statutes entirely different from Section 641.

II.

THE SENTENCE ON COUNT 25 WAS CONSECUTIVE TO THE SENTENCE ON COUNTS 1 THROUGH 12.

Appellant has urged that the trial court did not impose a sentence on Count 25 consecutive to that imposed under Counts 1 through 12. Apparently Thomas attempts to fashion his argument from a twisted interpretation of the Court's language in imposing judgment. The judgment provides for a 10-year term on the first count; 10-year terms on Counts 2 through 12, concurrent with the term on Count 1; a 10-year term on Count 13, to be served after the expiration of the terms on Counts 1 through 12; and 10-year terms on Counts 14 through 25, to be served concurrently with the term on Count 13. The form of the judgment raises no problem of interpretation; it is simply a matter of reading the plain meaning of words to see that the term under Count 25 is to be

served upon the expiration of the terms under Counts 1 through 12.

III.

THE DISTRICT COURT DID NOT ERR IN DECLINING TO RULE ON THE MERITS OF APPELLANT'S CONTENTION THAT THE CHARGES IN COUNTS 13 THROUGH 24 WERE MERGED INTO THE CHARGES IN COUNTS 1 THROUGH 12.

Since the term of imprisonment imposed on Count 25 was concurrent with the terms of imprisonment on Counts 13 through 24, it was immaterial whether or not the conviction on Counts 13 through 24 would support a sentence consecutive to the sentence imposed on Counts 1 through 12. *Chin Bick Wah v. United States* (9th Cir. May 28, 1957); *Goldbaum v. United States*, 204 Fed. 74 (9th Cir. 1953), cert. denied 346 U.S. 831.

Appellant's contention that the District Court should have passed on the merits of his arguments as to Counts 12 through 24 (the sale of Government property counts), does raise a point which is material to the present appeal. The District Court could have ruled and this Court might well choose to rule that appellant's motion to correct sentence was defective on another ground. The motion to correct sentence was based upon the argument that the offense charged in Count 13 was identical with that charged in Count 1, the offense charged in Count 14 was identical with that charged in Count 2, and so on. Appellant did not urge that *all* of the offenses charged in Counts 13

through 24 were merged into the offense charged in Count 1 or any other single count in the group of Counts 1 through 12. Thus, the total of 20 years' imprisonment could be sustained by holding that Counts 1 and 24, for example, were separate and distinct offenses, since they related to entirely separate items of property.

CONCLUSION.

Appellant was sentenced to a term of imprisonment totalling 20 years upon conviction of 25 counts charging 25 separate and distinct offenses, for which he could have been sentenced to a term of 250 years. His motion to correct sentence was properly denied and the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
July 8, 1957.

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